Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-1718

IN THE

Supreme Court of the United States

OLIVER "BUCK" REVELL,

Petitioner,

v.

DAVID HOFFMAN, ESTATE OF ALEXANDER B. MAGNUS AND AMERICANS FOR RESPONSIBLE MEDIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Contrary to the Petitioner's assertions this case presents no new questions regarding the standard in a public figure defamation case for proving actual "malice."

Contrary to the Petitioner's assertion, the Tenth Circuit Court of Appeals' ruling in this matter was not in conflict with *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), nor at odds with five other circuits on the issue of "malice."

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The named Respondents are the only parties who are real parties in interest in this matter.

Respondent, Americans for Responsible Media, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Rules:

Federal Rules of Appellate Procedure 43(a) 1

COME NOW the Respondents, David Hoffman, Estate of Alexander B. Magnus and Americans for Responsible Media, a corporation, (ARM) and for their brief in opposition to the Petition for Writ of Certiorari, as filed by Oliver "Buck" Revell, allege and state as follows:

OBJECTION OF THE ESTATE OF ALEXANDER B. MAGNUS TO THIS COURT'S ASSERTION OF JURISDICTION OVER IT.

During the pendency of Petitioner (appellant therein) Revell's appeal before the Tenth Circuit Court of Appeals, one of the original defendants (appellees), Alexander B. Magnus, passed away. Counsel for Mr. Magnus timely filed a suggestion of death as noted by the Tenth Circuit in the first paragraph of its written opinion. [See Appendix I, p. 2.]

Revell never moved for a substitution of the decedent's personal representative nor made the Magnus Estate a substituted party to the appeal. Additionally, Revell did not effect service on the Magnus Estate or on a personal representative, as required by Federal Rules of Appellate Procedure 43(a).[1] Consequently, the Tenth Circuit noted in its opinion: "Thus, only David Hoffman and ARM remain as defendants on appeal." [See Appendix I, p. 2.]

In summary, Mr. Revell cannot properly include the Estate of Alexander B. Magnus in this Petition for Writ of Certiorari. This Court has no jurisdiction over said estate since Petitioner Revell failed to properly adjudicate his prior appeal.

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1. Revell merely (unilaterally) "changed" the caption of the case on subsequent pleadings that he filed with the Tenth Circuit Court of Appeals.

OBJECTIONS TO MISSTATEMENTS OF FACT, MISSTATEMENTS OF THE LAW AND MISSTATEMENTS OF THE RECORD WHICH ARE CONTAINED IN PETITIONER'S STATEMENT OF "QUESTIONS PRESENTED."

In his "Questions Presented," the Petitioner continues a prior pattern of misstatements of law, fact and the record. These misstatements have proven fatal to Petitioner's case in the trial court and before the Tenth Circuit Court of Appeals.

A. Misstatements of Law.

The Petitioner incorrectly claims that the Tenth Circuit's legal standard of proof (for public figures to prove "actual malice" in a libel action) is "in conflict with five other circuits." As discussed, *infra*, however, the Petitioner often mixes apples and oranges. For example, he cites and discusses Ninth and Fifth Circuit cases which deal only with the sufficiency of allegations in initial pleadings (*i.e.*, in the Complaint) and which cases are irrelevant to issues of "proof" necessary at the summary judgment stage of a libel proceeding. Moreover, the Petitioner totally fails to document any actual conflict between the Tenth Circuit decision at issue and this Court's prior opinions regarding proof of "malice" toward a public figure.

B. Misstatements of Fact or Record.

The Petitioner seeks to prejudice the Court by grossly distorting the record. The Petitioner provides a purported "sampling of [supposedly libelous] allegations" which the Respondents were alleged to have made. However, said

"libelous statements" were simply never made, or were not made in print and were never published. Many of the alleged "libels" trumpeted in Petitioner's Petition actually occurred during Respondent/author David Hoffman's deposition or were contained in an unfinished, unpublished draft of a book entitled *Murdergate*. The manuscript of *Murdergate* was produced to the Petitioner and his attorney during discovery and the trial court found that any statements therein lacked publication (see trial court's Opinion, dated May 31, 2001, Supplementary Appendix to Petition for Writ of Certiorari, p. 10). Unpublished deposition testimony or an unpublished manuscript cannot be used to establish a claim for libel.

Examples of Petitioner's Misstatements of Fact Contained in "Questions Presented":

- "Mass Murder. I mean Pan Am 103." (This statement was made only at Hoffman's deposition. It is taken out of context and doesn't refer to "Buck" Revell. See R. 131.)

- "They knew about the bombing and didn't stop it." (This comment was also made only at Hoffman's deposition. Again, the comment does not directly refer to "Buck" Revell. See R. 131.)

- "Oliver 'Buck' Revell was transferred to the Dallas FBI to keep a lid on the case to cover up alleged CIA involvement in 'E-Systems drug smuggling.'" (This is not an accurate quote. It actually a combines several different statements made in the unfinished, unpublished book *Murdergate*, with the allegations of a man named Winiford Richardson whose allegations were contained in an internet letter from Hoffman to WorldNetDaily. See R. 140.)

- "Hoffman/Revell/E-Systems. Here is a story of political/intelligence agency deception, intrigue and murder!" (This purported libel incorrectly combines the "subject" of an email letter sent by Hoffman with part of the text of the letter itself in order to incorrectly suggest that Hoffman accused Revell personally of "deception, intrigue and murder." See R. 140.)

- "Mr. Revell is an FBI agent guilty of a whole litany of crimes." (This alleged libelous statement simply never occurred. The actual (rhetorical) statement made by Respondent Hoffman was "I responded that a journalist arrested on a couple of bogus charges no more 'bares out his lies' than an FBI agent guilty of a whole litany of crimes, but who's never arrested." See R. 141.)

- Petitioner (Revell) continues to misstate the facts (with no support in the record) when he falsely assets that Respondent Hoffman (supposedly) admitted that most of his statements were "based on hearsay, feelings and ideas about mere possibilities, based on information from alleged confidential sources." See Revell Petition, p. ii. (Quite to the contrary, Hoffman forthrightly identified his sources for everything that he actually published (i.e., *The Oklahoma City Bombing and the Politics of Terror*). Hoffman outlined his reasons for believing in their accuracy. These sources were extensively detailed by the Tenth Circuit Court in footnote 1 on page 10 of the Tenth Circuit Opinion dated October 30, 2002.)

OBJECTIONS TO MISSTATEMENTS OF FACT AND DISTORTIONS OF THE RECORD CONTAINED IN PETITIONER'S "STATEMENT OF THE CASE."

The Petitioner continues to distort the facts and the record in his "Statement of the Case."

A. Inaccurate Description of Alleged Libelous Statements.

Revell repeatedly suggests that Hoffman simply invented a quote from a former Army CID named Gene Wheaton. Wheaton's accusations concerned some third parties (*i.e.*, not Revell) regarding discussions about the *potential* creation of "death squads." The Petitioner trumpets Wheaton's affidavit (which affidavit is *not* in the record) because Wheaton supposedly said that he never personally talked to Hoffman about the "death squad" discussions. (See pp. 2, 5, 17 and 27 of Petitioner's Petition.) However, Petitioner's insinuation that Wheaton never had such discussions is disingenuous at best. In the trial court, and on appeal, Hoffman introduced an extensive article written by Wheaton himself entitled *The National Reconnaissance Office – Ready to Kill* regarding these precise allegations. See R. 154. Moreover, Hoffman also introduced Gene Wheaton's threatened trial court "Motion for Sanctions" against Revell. In his motion, Wheaton acknowledges the death squad discussions, but points out in detail that the remarks weren't even arguably defamatory as to Buck Revell because they didn't pertain to him. See R. 231-233.

The "Statement of the Case" further distorts the record and exaggerates Hoffman's actual statements. The Petitioner falsely asserts that Hoffman wrote:

- That Revell knowingly and wilfully failed to act to prevent the bombing with a loss of some 270 lives. Revell Petition, p. 2. (This remark was never made. Note that Petitioner Revell includes no quotation marks around this invented libel. See R. 110-111.)

- That Oliver "Buck" Revell was transferred to the Dallas FBI office to keep a lid on the case to cover up alleged CIA involvement in E-Systems drug smuggling. Revell Petition, p. 2. (This statement was never made. See discussion about this incorrect paraphrase *supra* on p. 2.)

- That Mr. Revell destroyed evidence in the bombing of a DC-8 in Gander with the loss of 248 personnel. Revell Petition. pp. 2-3. (This remark was never made. Note that Revell includes no citation to the record for it. Moreover, the Petitioner's self-serving bold face "rebuttal" to the invented libel is also not in the record.)

- "That a whistle-blower, after reporting to Mr. Revell's subordinate had her son killed, then she was killed". Revell Petition, p. 3. (This is a totally inaccurate quote, and is also taken out of context. It omits key language from the actual quotation. The actual quotation does not suggest that Revell had anybody killed. See R. 140.)

- That Mr. Revell is an FBI agent guilty of a whole litany of crimes. Revell Petition, p. 3. (This was never said, as discussed *supra* on p. 2. See R. 141.)

- That Mr. Revell had involvement in drug smuggling. Revell Petition, p. 3. (This statement was never made. Petitioner is referring to some colloquy that occurred at Hoffman's deposition which colloquy was never published by anyone but "Buck" Revell. See. R. 135.)

- That Mr. Revell "committed mass murder." Revell Petition, p. 3. (This outrageous mischaracterization was never written or published by Hoffman anywhere. Note that the Petitioner does not even attempt any citation to the record for this alleged libel.)

- That Mr. Revell was a damage control man for Oliver North in the Iran-Contra situation. Revell Petition, p. 3. (This statement was never published by Hoffman. The Petitioner is referring to some colloquy that occurred at Hoffman's deposition. It has never been published by anyone except "Buck" Revell. See R. 134.)

- That the FBI had not received any warning of the impending Pan Am 103 bombing. Revell never left Washington and all his family members were in the United States. Revell Petition, p. 4. (This is an inaccurate summary of Revell's testimony.) This "fact" is also disputed. Professor Hart Lidov wrote

the following for the Columbia [University] Journalism Review:

> In 1995 Revell appears to have acknowledged in print that his own son was scheduled to travel home on leave for Christmas on Pan Am 103 and unexpectedly had his trip moved back by two weeks, saving him from the ill-fated flight. The U.S. government had received the famous Helsinki Warning on December 5, two days before young Revell's leave was moved up. This is the same warning which was disseminated to U.S. Embassies across Europe and then declared a hoax after FBI agents, Revell's subordinates, paid a visit to Helsinki. See R. 184.

B. Inaccurate Characterizations of the Respondents.

The Petitioner also takes substantial liberties with the record in describing and (mis)characterizing the Respondents and their actions:

- Hoffman (supposedly) wouldn't respond to questions during his deposition about the allegations that Revell "committed mass murder." [See Revell Petition, p. 3.] The portion of the record cited by Revell for this nonsense is "Rec. 68." Even a cursory examination of page 68 of the record shows that it is not part of Hoffman's deposition at all but a page from his book (which certainly doesn't accuse Revell of "mass murder").

- Americans for Responsible Media (supposedly) is an organization dedicated to irresponsibly smearing

ranking government officials. Revell Petition, p. 5. This outrageous false characterization was made without any citation to the record and without any proof thereof. Revealingly, Revell also claims that the Tenth Circuit Court of Appeals smeared Revell with an allegation (in its Opinion) which was (supposedly) "injected from thin air." Revell Petition, p. 5.

- The "scheme" of falsely smearing government and law officials was (supposedly) instigated, aided and abetted by Alexander B. Magnus, now deceased. Revell Petition, pp. 5-6. Again the Petitioner omits any citation to the record for his assertion (because he has no proof thereof).

- Mr. Hoffman (supposedly) "readily admitted" that the sources for much of his information were *The Portland Free Press*, the *Marxist Review* (and other "fringe publications"). Revell Petition, pp. 11 and 17. Again, Revell conveniently gives no citation to the record for this assertion. In actuality, Hoffman *never* testified that he relied on the *Marxist Review* or other "fringe publications."

- "[There was] circulation on the Internet of excerpts from the as yet unpublished book, *Murdergate*." Revell Petition, p. 2. This assertion is false and certainly no citation to the record is given. This factual misrepresentation was also attempted by Revell before the Tenth Circuit Court of Appeals. The Respondents (appellees therein) pointed out to that Court that the record citation which Revell was attempting to use in his brief [Appendix 140-142]

was merely a promotional synopsis of the unpublished book, *Murdergate*, and contained no excerpts at all. Revell now reprises this false assertion.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS NOT AT ODDS WITH THIS HONORABLE COURT'S PRIOR DECISIONS REGARDING "ACTUAL MALICE."

A. Circumstantial Evidence Was Not Rejected.

The Petitioner seizes upon a quotation utilized by the Tenth Circuit in its Opinion as taken from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 243, 256 (1986), to wit: "[There was] no concrete evidence from which a reasonable juror could return a verdict in his favor." [See Appendix I, p. 8.]

Based on the Tenth Circuit's use of this quote from *Liberty Lobby*, the Petitioner jumps to the erroneous conclusion that the Tenth Circuit somehow rejected the use of circumstantial evidence to prove "malice." Revell Petition, pp. 7-8. Nonsense. The Tenth Circuit no more rejected circumstantial evidence as proof of malice than did this Honorable Court (in the cited *Liberty Lobby* quotation) when it originally used the phrase "concrete evidence."

The Petitioner continues to attempt to excuse his total lack of evidence regarding the issue of "malice" by again contending that Hoffman's (purported) statements about Revell are "inherently improbable" and therefore must have been "reckless." Revell Petition, p. 4. Setting aside the fact

that Revell has consistently expanded, distorted and exaggerated Hoffman's actual published comments, Revell's theory of "obvious" malice has been rejected by the trial court, Supplementary Appendix, p. 11, and by the Tenth Circuit, Appendix I, p. 8. The Petitioner does not explain (because he cannot) how the trial court and the Tenth Circuit supposedly "disregarded the teaching of *Liberty Lobby*." Revell Petition, p. 8.

Moreover, Revell completely fails to acknowledge or to deal with the high standard set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974) that ". . . public figures and those who hold government office may recover for injury to reputation only on *clear and convincing proof* that the defamation falsehood was made with knowledge of its falsity or with reckless disregard for the truth." (Emphasis added.)

B. Cases Regarding "Deliberate Lies or Calculated Falsehoods" Are Irrelevant.

The Petitioner ignores his lack of proof concerning "malice" and (based on *ex parte* factual pronouncements by his counsel and by using "evidence" not in the record) announces that Hoffman's remarks about Revell (many of them never published) constituted "pure fiction" or "repetition of totally false and fabricated allegations." This gambit allowed Revell to inject cases holding that deliberate lies or falsehoods are outside the scope of First Amendment protection (with related "privilege" issues). Revell Petition, pp. 9-11.

All of Petitioner's authority is irrelevant, however, since there is no proof in the record that Hoffman deliberately lied about Revell. Indeed, a substantial part of the "proof" offered

by Revell that Hoffman had deliberate malice toward Revell was a quote from an article written by Robert Carl Miller wherein Miller called Revell a "superspook" and a "damage control" guy. Revell Petition, pp. 10-11. Revell then announces that such assertions (not even made by Hoffman) are inherently improbable and constitute circumstantial evidence of malice. Revell Petition, p. 11.

C. The Tenth Circuit Never Held That Reliance on Published Materials Creates Immunity from Defamation.

Similarly to what Petitioner has done from the outset to Hoffman, Revell also seeks to put words in the mouth of the Tenth Circuit Court of Appeals (which were never spoken). On page 9 of the Petition Revell asserts that the "court below . . . held that reliance on published material somehow negates recklessness and creates immunity from defamation. . . ." Revell Petition, p. 9. A review of the Tenth Circuit's written Opinion does not reveal any such holding. The cases Revell then cites to rebut the (phantom) holding are irrelevant.

In summary, the Tenth Circuit affirmed the trial court's finding that Hoffman did conduct an investigation prior to publishing (p. 9 and footnote 1 of p. 10 of Tenth Circuit Opinion, Appendix I to Petitioner's Petition). Furthermore, the Tenth Circuit noted that they had "no facts before [them] that might call into question the veracity of Hoffman's sources." [Appendix I, p. 9.] In so holding, the Tenth Circuit obviously rejected the Petitioner's relentless efforts to quote from affidavits which were not in the record [Revell Petition, p. 17] to offer "factual" information from his own counsel's purported "interview" with another defendant/witness which interview was not part of the record, [Revell Petition, p. 17]

to rely upon suspect factual pronouncements made by Revell's counsel "during oral arguments" and to inject factual misrepresentations into his brief about whether or not PBS documentaries ever aired (which assertions actually contradict the record). [Revell Petition, p. 17.]

The Respondents respectfully urge this Court to likewise reject these reprised improper tactics. No "clear and convincing" showing of actual "malice" could possibly be made upon such a record.

II. THE DECISION OF THE TENTH CIRCUIT WAS NOT IN CONFLICT WITH THE DECISIONS OF FIVE OTHER CIRCUITS.

The Petitioner asserts a conflict between Circuits and launches into a tortured analysis which eventually focuses on several cases that deal with the sufficiency of allegations in an initial defamation complaint. [Revell Petition, pp. 22-24.]

The Ninth Circuit case from which Revell quotes extensively is *In re Glenfed, Inc.*, 42 F.3d 1541 (9th Cir. 1994). Inexplicably the Petitioner then concludes:

> *The First Amendment imposed substantial requirements on the state of mind a public figure must prove in order to recover for defamation, but it doesn't require him to prove that state of mind in the complaint.* (Emphasis in original.)

[Revell Petition, p. 23.] The Petitioner also cited Fifth and Second Circuit cases for this "conflict between Circuits."[2] [Revell Petition, p. 23.] However, Petitioner's "authority" regarding pleading requirements is simply not pertinent to the case at bar which involves a ruling on a summary judgment (evidentiary) motion.

CONCLUSION

It is respectfully suggested that Mr. Revell and his attorney are banking on a favorable ruling herein based more on who he is and upon the prominent witnesses that he supposedly would have presented at trial (*e.g.*, Revell Petition, pp. 26-27) than upon his "evidence" or established and controlling federal and Oklahoma libel law. Mr. Revell's case and his Petition are without merit. The Court is very respectfully asked to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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2. *Balli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967) and *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 410 (2nd Cir. 2000).